CADRE's 5th National Symposium on
Dispute Resolution in Special Education

Recent Legal Happenings[1]

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I. SUPREME COURT -

Schaffer v. Weast, 126 S. Ct. 528, 546 U.S. 49 (2005)

Burden of proof

Arlington v. Murphy, 126 S. Ct. 2455, 548 U.S. 291 (2006)

Expert witness fees

Winkelman v. Parma City, 127 S. Ct. 1994 (2007)

Parents' IDEA rights

Forest Grove v. T.A., 129 S. Ct. 2484, 557 U.S. ____ (2009)

Public school attendance prior to private placement

II. EVALUATION AND ELIGIBILITY

A. Pertain to all disabilities

1. PWN of Identification or change must contain disability category (*OSEP*, 56 IDELR 141, 2010)
2. IDEA > M.D.s/DSM-IV (*Marshall Joint Sch. Dist. No. 2 v. C.D.,* 54 IDELR 307, 7th Cir. 2010) Physicians' view of rare genetic condition and PE over-ruled by IEP teams (*Brado v. Weast*, 53 IDELR 316 (D. Md. 2010). Court over-ruled primary physician who said home

[1] *This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual situations.*

instruction necessary due to chronic pain. Court said §504 accommodations at school sufficient.

3. "Education" means academics only, so any student who does well academically cannot be IDEA-eligible (*A.J. v. Bd. East Islip U.F.S.D.,* 53 IDELR 327 (E.D.N.Y. 2010). A student with Asperger's and social/behavioral problems not eligible if adequate academically.
4. Many courts emphasize "needs special education" and "adverse effect," so if student is OK in regular education, not eligible
5. OK to not evaluate ELLs for 3 years under Title VI (not IDEA). (*Mumid v. Abraham Lincoln H.S.,* 55 IDELR 33 (8th Cir. 2010) cert. denied.
6. When a district has reason to suspect a student may have a disability the duty is to evaluate within a "reasonable time". No "bright line test" for reasonable time. One court found that more than a few months violated child find (*D.G. v. Flour Bluff ISD*, 56 IDELR 255 (S.D. Tex 2011), but …
7. OK to require general education intervention before special education referral as long as parents can still request an evaluation (*A.P. v. Woodstock Bd. of Ed.,* 370 F. App'x 202 (2nd Cir. 2010).
8. An amazing case: *Compton USD v. Addison*, 598 F. 3d 1181 (9th Cir. 2010). A 10th grader was referred to a mental health counselor who recommended a special education evaluation. It didn't happen. The student failed every class, played with dolls in class, she urinated on herself and her work was "gibberish". So the district passed her to 11th grade. The district's defense was that they "did nothing" and did not actively "refuse to evaluate", so no Child Find violation. One 9th Cir. Judge agreed with the district. Two did not.
9. The same district denied FAPE to a 6-year-old by failing to adequately assess him from October to June and then proposing

an inadequate IEP based on a faulty and incomplete evaluation (*Compton U.S.D. v. A.F.,* 54 IDELR 225 (C.D. Cal. 2010).

10. *Phillp & Angie C. v. Jefferson Co. Bd. of Ed.,* 56 IDELR 225 (N.D. Ala. 2011). Reimbursement for IEE exceeds IDEA statue. (Oh, really?)

B. Specific Learning Disabilities

1. SLD eligibility requires data to show (a) appropriate instruction and (b) repeated assessments of progress given to the parents (34 CFR 300.307, 309)
2. RtI must be permitted for SLD evaluation.
3. RtI may not delay evaluations (Memo to State Directors, 56 IDELR 50, OSEP, 2011) (OCR IV, 2010)
4. RtI abused in Iowa, Illinois, Virginia (Bev Johns, August 2011)
5. J*.B. v. S. Orange/Maplewood Bd. of Ed.,* 56 IDELR 171 (D.N.J. 2011) the district used only a numerical discrepancy formula for SLD eligibility and in so doing violated IDEA.

III. IEPs

A. Team membership

1. Must have a special education teacher or provider who has worked with or will work with the child (*Mahoney v. Carlsbad USD*, 56 IDELR 217 (9th Cir. 2011))
2. Did not include representative from private school student attended and an inappropriate placement resulted. (*S.H. v. Plano ISD,* 54 IDELR 114 (E.D. Tex. 2010)).
3. Same as #2 from recommended private placement (*Werner v. Clarkston Central S.C.*, 43 IDELR 59 (S.D. N.Y. 2005)).
4. Failure to include parents or other required members denies FAPE (*K.M. v. Ridgefield,* (D. Conn. 2008)).

5. If parents withdraw from the IEP process, district is not responsible for procedural defects (*Systema v. Academy S.D. #20,* (10th Cir. 2008)).

B. Implementation of IEPs

1. Must implement parts of IEP not in dispute (*B.T. v. Doe Hi.,* 56 IDELR 218 (D. Hi. 2011)).
2. Implementation failure denies FAPE only when "the defect is material" or an "essential element" is not implemented. The 5th, 8th and 9th Circuits agree, e.g., *Van Duyn v. Baker S. D. 5J* (9th Cir. 2007).
3. FAPE was denied by a 26-day delay between IFSP and implementation of the IEP (*Shaun v. Hamamoto,* 53 IDELR 185 (D. Hi. 2009)).
4. Needed speech therapy not provided is OK because intent of IDEA to "open the door". (*N.C. v. Utah St. Bd. of Ed.,* 43 IDELR 29 (10th Cir. 2005)).

IV. FAPE

A. *Rowley* = "some education benefit". Interpretations include "any", "some", "more than trivial", "meaningful" and "meaningful in relation to potential."

B. Some believe the 1997 and 2004 Amendments have superceded *Rowley* and raised the FAPE standard.

C. The saga of the 9th Circuit's journey from *N.B. v. Hellgate Elem.,* 541 F. 3d 1210 (9th Cir. 2008) **to *J.L. v. Mercer Is. S.D.,*** 575 F. 3d 1025 (9th Cir. 2010) **is close to astonishing.** *Well, at least notable.*

D. Generalization across settings is not required for FAPE in the 10th and 11th Circuits (*Thompson R-2 J.S.D. v. Luke P.,* 540 F. 3d 1143 (10th Cir., 2008)); (*J.S.K. v. Hendry Co. S.D.,* 941 F. 2d 1563 (11th Cir. 1991)).

E. Examples of denials of FAPE:

1. Used ineffective reading program for 3 years
2. Recycled ineffective IEP year after year
3. Omitted a "sensory diet" and behavior plan for child with autism.
4. Provided ½ of the ABA in IEP
5. Extracurricular activities not provided in IEP to "maximum extent"
6. "One-size fits all" not individualized behavior plan (*B.H. v. W. Chermont Bd. of Ed.,* 56 IDELR 226, (S.D. OH 2011)).

F. FAPE <u>not</u> denied:

1. No written Behavior Plan
2. Needed parent training and counseling omitted from IEP
3. IEP goals not met
4. "Some headway" in academics sufficient for FAPE
5. Denial of prosthetic arm to 3-year old who "did much better with it" (*J.C. v. New Fairfield Bd. of Ed*., 56 IDELR 207 (D. Conn. 2011))

V. ASSESSING BENEFIT (PROGRESS)

A. Cases are plagued by inadequate measures of progress. Only one case has been located which used curriculum-based measurement (*C.B. v. Special S.D. No. 1,* 636 F. 3d 981 (8th cir. 2011)).

B. Cases have zero consistency as to weighing grades, promotion, standardized test scores, subjective reports, etc. For example, *Jaccari v. Bd. of Ed. of City of Chicago,* 690 F. Supp. 2nd 687 (N.D. Illinois, 2010).

C. If IDEA requirements for measured, objective baselines (PLOPs) and measured progress reports were followed, problems of assessing progress would be greatly alleviated.

D. Some courts look at progress relative to students' potential; most do not.

VI. METHODOLOGY AND PEER-REVIEWED RESEARCH

A. Whether methodology is to be on the IEP is a team decision and many times it should be (34 CFR 300.39(a)(b); (64 F.R. 12552), **but some courts (e.g., the 11th Circuit) refuse to recognize this and refuse to deal with the peer-reviewed research requirement** (*M.M. v. Sch. Bd. of Miami-Dade Co.,* 11th Cir. 2006).

B. In *Bd. of Ed. of Co. of Marshall v. J. A.*, 56 IDELR 209 (N.D. W. Va. 2011), **the court said a method is OK even if has zero research and very positive research is available on other methods.** The court believes that "to the extent practicable" does not preclude eclectic or untested "methods".

C. In battles between a district's chosen method and parent's preferred methodology, courts take several different positions:

1. Simply defer to the district, regardless. (*Casey K. v. St. Anne Comm,* H.S. No. 302 (C.D. Ill. 2006)).
2. Parents' method can prevail if parents can prove it is the only method from which the child can benefit (*Brown v. Bartholomew Consolidated Sch. Corp.,* 43 IDELR 60 (S.D. Ind. 2005)).
3. Parents' method can prevail if districts' method is not properly implemented (*Miller v. Bd. of Ed. of Albuquerque P.S.,* 46 IDELR 162 (D.N.M. 2006)).
4. Examine the methodologies carefully and take into account research on the methods (*Deal v. Hamilton Co. Dept. of Ed.,* 46 IDELR 45 (E.D. Tenn. 2006)); *Henrico Co. v. R. T.* (2006).

VII. PLACEMENT AND LRE

A. The Continuum of Alternative Placements v. Inclusion

1. Nothing new here. Courts continue to follow IDEA, e.g.:
   a. *Lessard v. Wilton-Lyndeborough Coop. S.D.,* 592 F. 3d 267 (1st cir. 2010) Special day school less restrictive than home school.
   b. *A.G. v. Wissahickon S.D.,* 374 F. App'x 330 (3rd cir. 2010) Full inclusion inappropriate for 18-year old prone to loud vocalizations and not toilet-trained.
   c. *C.P. and J.D. v. DOE Hi.,* 54 IDELR 218 (D. Hi. 2010). Self-contained class with 1:1 instruction appropriate for aggressive 8-year old.
   d. (Hard to believe) A very aggressive non-verbal, self-injurious 6-year old who required 3 or 4 adults to restrain her could be placed in a 6:1:1 setting because it had a token system. (*E.M. v. N.Y. City Dept. of Ed.,* 56 IDELR 134 (S.D. N.Y. 2011))
   e. If a child can't benefit from exposure to non-disabled peers or needs a life skills program (rather than academic), courts reject extreme inclusion.

B. Predetermination of Placement (or Program) (PPP)

1. PPP has rapidly become a common allegation which the 9th Cir. has described as "when a district has made its determination prior to the IEP meeting, including when it presents one option and is unwilling to consider others" (*H.B. v. Las Virgenes USD*, 239 F. App'x 342 (9th Cir. 2007)).

C. LRE and Parents' Private Placement

1. Some courts apply LRE with no analysis, thus denying reimbursement for any specialized, segregated program selected by parents.
2. At least 3 circuits hold that LRE does not apply at all to parents' placements, which only need to be "proper" or "appropriate" (6th, 8th, 3rd Circuits).
3. The 2nd, 4th and 9th Circuits employ a balancing approach in which appropriate is important, but LRE may be considered (*P. v. Newington Bd. of Ed.,* 51 IDELR 2 (2nd Cir. 2008)). The private placement must be appropriate.

D. A residential placement, to be reimbursed, must be primarily related to educational purposed (*Forest Grove v. T.A.,* 9th Cir. 2011)

E. *(A common sense case.)* Parents made unilateral placement in a private school, but couldn't pay for it; a fact the private school accepted.

Even though IDEA speaks only to reimbursing parents, here the court said OK to have district that denied FAPE pay the private school directly (*Mr. & Mrs. A. v. N.Y. City Dept. of Ed.,* 56 IDELR 42 (S.D. N. Y. 2011).

F. An interesting split exists among the Circuits as to whether the district must name the specific school in the placement offer.

- The 9th and 4th Circuits say yes (*Union S.D. v. Smith*, 15 F. 3d 1519 (9th Cir. 1994); (*Marcus I. v. DOE Hi.,* 56 IDELR 219 (D. Hi. 2011); (*A.K. v. Alexandria City Sch. Bd.*, 47 IDELR 245 (4th cir. 2007)).
- The 2nd Circuit says no, it need not name the specific school. ((*T.Y. v. N. Y. City Bd. of Ed. Reg. 4,* 53 IDELR 69 (2nd Cir. 2009)).

G. The "stay-put" provision, according to a district court in Florida, allows a change of location, but not a change in "program" while due process is pending. The district was allowed to move a student who had autism and great difficulty with transitions to another school while stay-put was in effect. (*L.M. and D.G. v. Pinellas Co. Sch. Bd.,* 54 IDELR 227 (M.D. Fla. 2010)).

H. The 2nd Circuit (*Walczak v. Fla. Union Free Sch. Dist.,* 142 f. 3d 119 (2nd Cir. 1998) **requires objective evidence of regression in a day program before a residential placement is deemed necessary.** The *Walczak* Court claims the 1st, 3rd, and 9th circuits also require regression. However, in the cases cited in those Circuits regression was present, but did not appear to be required.

VIII. NOTEWORTHY MISCELLANY

A. Monetary damages can be awarded under §504 for denial of FAPE, as defined by §504. *Mark H. v. Hamamoto,* 55 IDELR 31 (9th Cir. 2010).

B. Three cases in the Eastern District of Missouri in 2010 allowed audio-visual surveillance as a remedy for failure to implement IEPs (e.g., *B.A. v. St. of Mo.,* 54 IDELR 77 (E.D. Mo. 2010)).

C. Bullying can deny FAPE and result in payment for private placements (3rd, 7th, 9th Circuits), but risk of bullying doesn't justify such payment.

D. Since 2008 ADA amendments, amelioration (even remission) does not bar ADA eligibility (*OCR*, 51, IDELR 80, 2008).

E. Settlement agreements reached outside of IDEA resolution or mediation cannot be enforced under IDEA.

F. There is no quantitative rule for awarding compensatory education. Rather, it should be calculated to restore the student to where he or she would have been but for the FAPE denial.

G. Courts are cracking down on failure to implement ALJ/HO decisions.

H. Behavior goals and plans need not be written. Team just needs to "consider strategies (Lathrop R-II S.D. v. gray, 611 F. 3d 419 (8th Cir. 2010) but a districts' failure to do a FBA and a BIP cost it full tuition of an ABA placement (*R.K. v. N.Y. City Dept. of Ed.,* 56 IDELR 212 (E.D. N.Y. 2011).